

SUPERIOR COURT
BARNSTABLE, SS

FILED JUL 30 2018

Scott L. Nelson Clerk

COMMONWEALTH OF MASSACHUSETTS

BARNSTABLE, SS.

**THE TRIAL COURT
SUPERIOR COURT DEPT.
CIVIL ACTION NO. 1872CV404**

Scott Smith
PLAINTIFFS

v.
JPMorgan Chase Bank, NA and
Harmon Law Offices, PC
DEFENDANTS

**EMERGENCY
MOTION**

**PLAINTIFFS' EMERGENCY MOTION FOR SPECIFIC PERFORMANCE,
TEMPORARY RESTRAINING ORDER, AND PRELIMINARY INJUNCTION**

Plaintiff, Scott Smith, hereby moves this Honorable Court for a temporary restraining order and preliminary injunction. Plaintiff ("Homeowner") moves for specific performance of paragraph 22 of his mortgage by enjoining the defendants from taking certain actions, primarily consisting of conducting a foreclosure sale of his home at 230 Starboard Lane, Osterville, MA 02655 ("HOME"), or taking any other collection or enforcement-related action against Homeowner until the resolution of all disputes pending before this Court. As grounds therefor, Homeowner submits the within affidavit and states the following:

FACTS

1. The purported mortgage that Homeowner gave on his HOME granted a power of sale subject to paragraph 22 of the mortgage, which provided him "the right to bring a court action to assert the non-existence of a default or any other defense of Borrower to acceleration and sale." (See, Comp. Ex. B).
2. Defendants have scheduled the foreclosure sale of the Homeowner's HOME to occur on

July 31, 2018 at 1:00 P.M. A copy of the sale date notice published by the auction company used by Harmon Law Offices, P.C. ("Harmon") and verification of same from Harmon's website, is attached hereto as Exhibit 1.

3. Additionally, defendants' notices of sale are matters of public record and have been published in newspapers local to the respective sites of the HOME.
4. Defendants failed to respond or confirm that they would cancel the scheduled foreclosure sale upon the filing of the complaint or to permit a court to decide whether Homeowner was entitled to enjoin the scheduled sale.
5. The injunction is requested to name Harmon as well as Commonwealth Auction Associates, Inc. to ensure quality control and loss of recourse for violations of the Court's orders. See, e.g., *Maack v. Wells Fargo Bank, N.A.*, 88 Mass. App. Ct. 664, 669-670 (2015) ("Harmon's acts of . . . failing to advise Commonwealth that it was prohibited by the TRO from scheduling a foreclosure sale of the property despite being prohibited by the preliminary injunction from conducting any such sale, are troubling. These actions may not have risen to the level of contempt . . .").

I. MORTGAGE TERMS AND POWER OF SALE GRANT PLAINTIFFS ABSOLUTE RIGHT TO FORESTALL NON-JUDICIAL SALE BY FILING A COURT ACTION

While Homeowner argues, in the alternative, that he is entitled under traditional standards for injunctive relief concerning a likelihood of success on the merits and irreparable injury, his primary argument is that such standards are not applicable to his case. Rather, the governing document is a mortgage contract. "[T]he right to acquire, possess, and protect property includes the right to make reasonable contracts, which shall be under the protection of the law." In re *Opinion of Justices*, 271 Mass. 508 (1930); Constitution Pt. 1, Art. 1.

July 31, 2018 at 1:00 P.M. A copy of the sale date notice published by the auction company used by Harmon Law Offices, P.C. ("Harmon") and verification of same from Harmon's website, is attached hereto as Exhibit 1.

3. Additionally, defendants' notices of sale are matters of public record and have been published in newspapers local to the respective situs of the HOME.
4. Defendants failed to respond or confirm that they would cancel the scheduled foreclosure sale upon the filing of the complaint or to permit a court to decide whether Homeowner was entitled to enjoin the scheduled sale.
5. The injunction is requested to name Harmon as well as Commonwealth Auction Associates, Inc. to ensure quality control and loss of recourse for violations of this Court's orders. See, e.g., Maek v. Wells Fargo Bank, N.A., 88 Mass. App. Ct. 664, 669-670 (2015) ("Harmon's acts of . . . failing to advise Commonwealth that it was prohibited by the TRO from scheduling a foreclosure sale of the property despite being prohibited by the preliminary injunction from conducting any such sale, are troubling. These actions may not have risen to the level of contempt . . .").

**I. MORTGAGE TERMS AND POWER OF SALE GRANT PLAINTIFFS
ABSOLUTE RIGHT TO FORESTALL NON-JUDICIAL SALE BY FILING A
COURT ACTION**

While Homeowner argues, in the alternative, that he is entitled under traditional standards for injunctive relief concerning a likelihood of success on the merits and irreparable injury, his primary argument is that such standards are not applicable to his case. Rather, the governing document is a mortgage contract. "[T]he right to acquire, possess, and protect property includes the right to make reasonable contracts, which shall be under the protection of the law." In re Opinion of Justices, 271 Mass. 598 (1930); Constitution Pt. 1, Art. I.

As a matter of construction, contracts of adhesion, such as a mortgage, in which the parties do not actually negotiate the terms of the contract, are to be strictly construed against the drafter. See e.g., Chase Commercial Corp. v. Owen, 32 Mass. App. Ct. 248, 253 (1992). The terms of the mortgage govern the mortgagee's conduct and must be conducted in good faith. See Sovereign Bank v. Shurgis, 2012 Westlaw 1014607 (D. Mass. 2012). Therefore, a consumer granting the extraordinary power of sale pursuant to paragraph 22 of the mortgage would reasonably conclude from reading its terms, that a foreclosure sale can be stopped as a matter of right upon the filing of a court action to challenge a foreclosing entity's jurisdiction and authority to foreclose. The contract terms granting the mortgagor the right to challenge a foreclosure sale say nothing about waiving due process or having to satisfy a high evidentiary threshold under compromised conditions, in order to access the courts. Rather, in order to invoke judicial oversight in advance of a non-judicial sale, the contract terms say only that a suit need be filed and reserve the mortgagor's right to assert any defense to acceleration or sale.

The construction of laws and contracts in the consumer protection context can be dramatically different than in the general commercial context. In the residential mortgage field, a homeowner's actual knowledge or actual injury may be irrelevant where statutes are construed as strict liability statutes,¹ on an objective reasonableness standard,² or where the sophisticated lender provides adhesion contracts that impose conditions precedent to acceleration and

¹ See, e.g., Portway v. Harmon Law Offices, P. C., No. 03-CV-10932RG3, 2005 WL 2365331 at *3 (D. Mass. Sept. 27, 2005).

² Objective reasonableness "is also appropriate in light of the sound tenet that courts must evaluate the adequacy of TILA disclosures from the vantage point of a hypothetical average consumer—a consumer who is neither particularly sophisticated nor particularly dense." *In re Cromwell*, 461 B.R. 99 (Bankr.D.Mass.2011) (Hillman, Bankr.J.), quoting Palmer v. Champion Mortg., 465 F.3d at 28 (citing Smith v. Cash Store Mgmt., Inc., 195 F.3d 325, 327-28 (7th Cir.1999) and Edmondson v. Allen-Russell Ford, Inc., 577 F.2d 291, 296 (5th Cir.1978)).

foreclosure that must be satisfied.³ For example, failing to inform borrowers that their exercise of the right to cancel the mortgage loan would mean "that the security interest in their house will be canceled" was found to be inadequate under the objective reasonableness standard to apprise the "average consumer" of the terms of a rescission. Cromwell v. Countrywide Home Loans, Inc., 483 B.R. 36, 42 (D. Mass. 2012).⁴ In the context of pre-foreclosure requirements, the well-settled standard of "strict compliance" is even more stringent. "Massachusetts 'adhere[s] to the familiar rule that 'one who sells under a power [of sale] must follow strictly its terms,' " so where a foreclosure sale occurs in the absence of authority, "there is no valid execution of the power, and the sale is wholly void." Bevilacqua v. Rodriguez, 460 Mass. 772, 762 (2011) *citing*, U.S. Bank Nat'l Ass'n v. Ibanez, 458 Mass. 637, 646 (2011), *quoting* Moore v. Dick, 187 Mass. 207, 211 (1905).

In the case at bar, Homeowner's right to specific performance and to enjoin defendants from conducting a foreclosure sale by the sole act of filing this lawsuit to challenge the sale, under paragraph 22 of the Mortgage, is secured by both contract and statutory law requiring strict compliance. Homeowners' statutory protections are founded under the power of sale which provides, "But upon any default . . . the mortgagee . . . may sell the mortgaged premises . . . , *first complying with the terms of the mortgage . . .*" Mass. Gen. Laws ch. 183, § 21 (emphasis added).

³ Foster, Hall & Adams Co. v. Sayles, 213 Mass. 319, 323 (1913) ("[t]he fact, if it was a fact, that the written notice which by the terms of the power of sale had to be given, would not have served any useful purpose is not an answer to the objection that the power was not duly complied with"); Aurora Loan Services, L.L.C. v. Weisbium, 923 N.Y.S.2d 609 (N.Y. App. Div. May 17, 2011) (compliance with 90-day pre-foreclosure notice requirement of RPAPL § 1304 is condition precedent to commencement of foreclosure action; actual notice and lack of prejudice irrelevant where lender left out list of counselors and did not file affidavit of proof of service by registered or certified and first class mail).

⁴ "The correct H-8 form states that: If you cancel the transaction, the [mortgage lien/security interest] is also cancelled." "The incorrect H-9 form states: If you cancel this new transaction, it will not affect any amount that you presently owe. Your home is the security for that amount." (emphases supplied) *Id.*, at 44.

Thus, to the extent that the defendants seek to take advantage of the terms of the mortgage, they are likewise bound to strictly comply with the terms of their or their grantor's own contract and the power of sale.

Pursuant to paragraph 22 of their mortgage, the Homeowners, in permitting the extraordinary power of sale in the event of a default, retained for their benefit **"the right to bring a court action to assert the non-existence of a default or any other defense of Borrower to acceleration and sale."** (emphasis added). See, Compl. Ex. B. This provision would make little sense if upon bringing the contemplated court action a mortgagee was permitted to proceed with the sale prior to the case being judicially reviewed and decided.

Though the interpretation of paragraph 22 in this specific regard has yet to be considered by any appellate authority, the Supreme Judicial Court has acknowledged its force in other contexts. In *Pinti*, for example, the court addressed the distinction between paragraph 22 of the standard form mortgage in judicial versus nonjudicial foreclosure states. "[I]n Florida, a judicial foreclosure State, [paragraph 22] provides that a lender's right-to-cure notice must inform the borrower of *"the right to assert in the foreclosure proceeding the non-existence of a default or any other defense of Borrower to acceleration and foreclosure."* (emphasis supplied). *Pinti v. Emigrant Mortg. Co., Inc.*, 472 Mass. 226, 237 n.17 (2015). Whereas, in Massachusetts, a nonjudicial foreclosure State, the default provision in paragraph 22 requires a mortgagee to give notice of an alleged default and to *"inform the plaintiffs of "the right to bring a court action to assert the non-existence of a default or any other defense of [the plaintiffs] to acceleration and sale."* (emphasis supplied). *Pinti*, at 237-38, quoting, *Beaton v. Land Court*, 367 Mass. 385, 392-393 (1975). The foreclosure sale in *Pinti* was held to be void for failing to strictly comply with the power of sale, G. L. c. 183, § 21, which required compliance *"with the terms of the*

mortgage . . . relating to the foreclosure of mortgages by the exercise of a power of sale . . . "

The procedural mechanics are such that consumers in judicial foreclosure states are spared from losing title to their homes in the absence of due process and an opportunity to present any defenses they may have to a foreclosure sale. The non-judicial corollary to essentially the same paragraph should not be any different. Under historically traditional and ordinary circumstances, a mortgagee had to file a foreclosure lawsuit and undergo judicial scrutiny of its jurisdiction and authority to foreclose prior to any sale. "The power of sale "evolved in order to meet the increase of business transactions requiring loans and the desire to have a more speedy process of foreclosing than was furnished by suit or entry." A.L. Partridge, *Deeds, Mortgages and Easements* 201 (rev. ed.1932). See 1 F. Hilliard, *Mortgages* 119 (1856) ("In consequence of the delays incident to the usual equity of redemption, a power of sale has now become a very frequent provision in deeds of mortgage... [However, the power] will be jealously watched, and declared void for the slightest unfairness or excess ...")." Eaton v. Fannie Mae, 462 Mass. 569, 580 n.15 (2012). Simply put, consumers lacking a valid defense in judicial foreclosure states may opt to do nothing and accept a judgment by default, whereas, in Massachusetts—a nonjudicial foreclosure state—consumers lacking a valid defense agree, by contract, to relieve the mortgagee of the burden of filing a formal lawsuit. Thus, the premise for granting a power of sale under nonjudicial procedures is that an unquestionable right to foreclose need not be burdened by unnecessary, formal litigation and filings, and it is on that basis that a consumer grants such an extraordinary power to the mortgagee.

It is unreasonable and even illogical that a Massachusetts borrower would understand or intend that their rights be any less favorable than those in other jurisdictions signing essentially the same form. Moreover, the ordinary consumer would not view as reasonable the right to bring

a court action to prevent a sale of their home, on the one hand, while the sale was permitted to go forward before the case could be decided, on the other. The ordinary consumer might even compare it to hanging a person before the completion of a criminal trial. The hanging analogy may be an appropriate one in a society and culture that equally holds life, liberty, and land in the highest regard. See, e.g., Constitution Pt. 1, Art. I.⁵

Without specifically deciding the issue, even the Supreme Judicial Court has made the connection, in reaching the inevitable, logical conclusion, that the right to bring a court action becomes a crucial contract right in circumstances where a valid defense exists, and that such a right would have little meaning if a sale were allowed to proceed ahead of final judgment concerning a mortgagor's defenses. See, e.g., Pinti, at 241-242. The failure to bring a court action "can have disastrous consequences for the mortgagor: if the mortgagor has a valid defense to the foreclosure sale *going forward*". Id. (emphasis added). In recognizing that a mortgagor's defenses must be judicially reviewed and decided *prior to a sale going forward* for a mortgagor to have received the full benefits of her contract bargain, the High Court has, at a minimum, framed the issue around a valid defense. The questions then, is whether a mortgagor's defenses must pass muster at the time of filing the action when document gathering and case preparation is compromised, and under the high evidentiary threshold of 'likelihood of success on the merits' to warrant a preliminary injunction, or whether the act of filing suit, by itself, permits a mortgagor to convert a nonjudicial foreclosure into a judicial foreclosure to test the mortgagor's defenses.⁶ In the latter case, ordinary procedural tools such as motions to dismiss and for

⁵ "All people are born free and equal and have certain natural, essential and unalienable rights; among which may be reckoned the right of enjoying and defending their lives and liberties; that of acquiring, possessing and protecting property; in fine, that of seeking and obtaining their safety and happiness."

⁶ As a practical matter of equity and due process, foreclosure law and the defense of a mortgagor's rights entail complex legal issues and voluminous records gathering and organization. Foreclosure defense in the context of a non-judicial foreclosure does not lend itself well to satisfying the high standards of 'likelihood of success on the merits' within the short time frame - 14 days' notice - that is typical for a notice of sale. A notice of foreclosure

summary judgment are available to screen out any invalid defenses.

Though perhaps novel, the question is not as difficult as it may first appear. To the extent of statutory interpretation, the power of sale requires strict compliance. The ultimate controlling source, however, is the governing terms of the mortgage contract set forth under paragraph 22. More to the point, paragraph 22 of the standard form mortgage does not trigger or contemplate a court's equity powers to enjoin either party's conduct. The Homeowner in this action is merely seeking specific performance of his "right to bring a court action to assert [their] defense to [a] sale." The necessity of a preliminary injunction, therefore, is not derived from the terms of paragraph 22, rather, it is derived from the defendants' breach of that provision of the mortgage contract that ought to have been honored at the outset, upon the filing of the case at bar. Paragraph 22 is not an absolute waiver of judicial oversight where a mortgagor has defenses to assert. Permitting a sale to go forward prior to final judgment on a mortgagor's defenses to a sale would be putting the cart before the horse. To construe these terms otherwise would not only ignore the understandings of the ordinary consumer, but it would further necessitate that consumers knowingly give up their constitutional rights to due process of law should they ever need to defend title to their home by challenging the right of sale.

Therefore, in exchange for pledging their homes and granting the power of sale, the standard mortgages at issue reserved certain rights to consumers, such as the Homeowner, to challenge the defendants' right to foreclose and to forestall a sale by the sole act of filing a court action.

II. PLAINTIFFS ARE ENTITLED TO A TEMPORARY RESTRAINING ORDER ON GROUNDS OF LIKELIHOOD OF SUCCESS ON THE MERITS OF

sale rarely provides sufficient time for homeowners to resource a qualified and available foreclosure defense attorney, and leaves scant time for a mortgagor's legal counsel to conduct records gathering, organization, review, legal research and to draft a complaint and motion for a restraining order, and to obtain necessary affidavits, all prior to a scheduled sale.

THEIR CLAIMS

In determining whether a temporary restraining order should issue, this court must evaluate: 1) whether a substantial threat exists that the moving party will suffer irreparable harm if the injunction is not granted; 2) whether the threatened injury to the moving party outweighs the threatened harm to the opposing party if the injunction is granted; and 3) whether there is a substantial likelihood that the moving party will succeed on the merits. Planned Parenthood League v. Operation Rescue, 406 Mass. 701, 710 (1990); Packing Industries Group, Inc. v. Cheney, 380 Mass. 609, 616-18 (1980); and DeiBuono v. Mass. Interscholastic Ath. Ass'n, 20 Mass. L. Rep. 740 (2006). "The task for the motion judge is to balance the risk of irreparable harm to the plaintiff and defendant "in light of [each] party's chance of success on the merits" at trial. *Id.* at 617. "Only where the balance between these risks cuts in favor of the moving party may a preliminary injunction properly issue." *Id.* Planned Parenthood League v. Operation Rescue, 406 Mass. 701, 710 (1990) *quoting* Packing Industries Group, Inc. v. Cheney.

III. PLAINTIFFS HAVE LIKLIHOOD OF SUCCESS ON MERITS THAT FILING A COURT ACTION FORESTALLS A NON-JUDICIAL FORECLOSURE SALE AND SUCH A SALE WOULD IRREPAIRABLY DEPRIVE PLAINTIFFS OF THIS CRUCIAL CONTRACT BENEFIT

For the reasons set forth above, Homeowner has a likelihood of success on the merits of his contract rights to forestall a non-judicial sale by filing a court action. The power of sale granted by a mortgagor permits a mortgagee to proceed non-judicially with a foreclosure sale of the secured premises in the event of a default. The terms of the mortgage, however, retain for the benefit of the mortgagor the right to bring a court action to challenge the existence of a default or to assert any other defense to the mortgagee's right of sale.

Should the defendants be allowed to proceed with a non-judicial foreclosure sale of the Homeowner's HOME, Homeowner will suffer the irreparable loss of this crucial contract benefit

which affords him the option of due process and judicial oversight. A court action is the only recourse to prevent the sale of Homeowner's HOME from occurring by potentially unscrupulous or negligent creditors. A court action is the only retained right Homeowner has to balance the extraordinary power given to the defendant mortgagor. Damages are inadequate to compensate Homeowner because the stress, ignominy, and public recordation of a foreclosure deed cannot be unexperienced, and, moreover, because every piece of real estate is unique, its deprivation is irreparable as a matter of law (discussed, *infra*).

Defendants, on the other hand, would suffer no irreparable injury by a postponement of the sale and they are not entitled to equitable considerations in this regard having waived them by sleeping on their rights beyond applicable statutes of limitations (*infra*) and unclean hands via fraud and misrepresentation (*infra*).

IV. PLAINTIFFS HAVE LIKLIHOOD OF SUCCESS ON MERITS THAT NOTE AND MORTGAGE ARE VOID AND UNENFORCEABLE WHERE STATUTES OF LIMITATION HAVE RUN

Statutes of Limitations

Even if the Court determines that Homeowner does not have a likelihood of succeeding on the merits of his claim that the impending foreclosure sale is unlawful because the underlying note lacked formation for failure to identify the lending party, Homeowner can prove that this foreclosure is beyond two applicable statute of limitations;

- 1) the six-year SOL on the enforcement of the note under Art. 3 of the Mass. implementation of the UCC in Chap. 106; and,
- 2) exercise of the power of sale in the mortgage is time-barred by operation of law because of the provisions of the obsolete mortgage statute.

(i) *6-year Statute of Limitations under the UCC*

Actions of contract on negotiable instruments, such as residential mortgage notes, are governed by a six-year statute of limitations pursuant to Art. 3 of the U.C.C. "[A]n action to enforce the obligation of a party to pay a note payable at a definite time must be commenced within six years after the due date or dates stated in the note or, if a due date is accelerated, within six years after the accelerated due date." M.G.L. c. 106, § 3-118.

In *Premier Capital, LLC v. KMZ, Inc.*, a case with similar facts as the present case but where a foreclosure sale had already taken place, the Supreme Judicial Court considered whether an action to enforce a sealed promissory note was subject to the six-year statute of limitations governing actions to enforce promissory notes, G. L. c. 106, § 3-118, or to the twenty-year statute of limitations governing actions "upon contracts under seal," G. L. c. 260, § 1. 464 Mass. 467 (2013). The SJC determined that the law of negotiable instruments applies equally to sealed and unsealed instruments. *Id.* at 473. "In light of the UCC's clearly stated purpose to provide a uniform statute of limitations for all actions under Art. 3, we conclude that the omission of former § 3-113 from the revised art. 3 has no bearing on the applicability of the statute of limitations set forth in G. L. c. 106, § 3-118, and that G. L. c. 106, § 3-118, applies to all negotiable instruments, sealed and unsealed." *Premier Capital, LLC v. KMZ, Inc.*, 464 Mass. 467, 473 (2013))("General Laws c. 106, § 3-118, takes the place of all other statutes of limitations that might otherwise apply to negotiable instruments.").

By virtue of the accelerated maturity date of the Homeowner's mortgage loan (i.e., the note), the six-year statute of limitations for defendants to collect or otherwise enforce the promissory note expired. See, Complaint ¶¶ 20-34. In light of the unenforceability of the promissory note, and, defendants and their predecessors having slept on their rights, defendants have no enforceable interest in the debt obligation evidenced by the subject promissory note.

It is well-established and long-standing law in the Commonwealth that a mortgage without an underlying debt is of no value and is unenforceable. "[I]t has long been recognized that 'a mortgage ultimately depends on the underlying debt for its enforceability.'" Deutsche Bank Nat'l Tr. Co. v. Fitchburg Capital, LLC, 471 Mass. 248, 254 (2015), *citing*, Eaton v. Federal Nat'l Mtg. Ass'n, 462 Mass. 569, 576, 578 n.11 (2012); Crowley v. Adams, 226 Mass. 582, 585, 116 N.E. 241 (1917), Wolcott v. Winchester, 81 Mass. 461, 15 Gray 461 (1860), and Howe v. Wilder, 77 Mass. 267, 11 Gray 267, 269-270 (1858). Accordingly, a mortgage is a device for providing security for a loan, but it does not generally have a binding effect that survives its underlying obligation. Deutsche Bank, at 254.

With respect to the defendants' asserted right to foreclose on the Homeowner's mortgage notwithstanding the absence of any underlying debt obligation, G. L. c. 260, § 33 "requires the holder of a mortgage to foreclose on the mortgage . . . before the secured debt is overdue by five years." Deutsche Bank, at 257. "The statute has never been interpreted to require satisfaction of a mortgage's underlying obligations before the mortgage becomes unenforceable." *Id.* See also, Eaton, 462 Mass. at 584-85, *quoting*, Restatement (Third) of Property (Mortgages) § 1.1 comment (1997) ("The function of a mortgage is to employ an interest in real estate as security for the performance of some obligation. . . . Unless it secures an obligation, a mortgage is a nullity"). "[T]he decisions of this court in years and centuries past provide support for the general proposition that, under our common law, a mortgage ultimately depends on connection with the underlying debt for its enforceability." Eaton, 462 Mass. at 587-88. Therefore, Defendants have no right of foreclosure because the subject promissory note is overdue by more than 5 years under Section 33, and because said debt obligation expired under G. L. c. 106, § 3-

(ii) *Obsolete Mortgage 5-year Statute of Limitations*

The obsolete mortgage statute provides: "A power of sale in any mortgage of real estate shall not be exercised and an entry shall not be made nor possession taken nor proceeding begun for foreclosure of any such mortgage after the expiration of . . . 5 years from the expiration of the term or from the maturity date . . ." M.G.L. c. 260, § 33. "[T]he common meaning of the 'maturity date of the mortgage' is the date on which the underlying debt is due because a mortgage derives its vitality from the debt that it secures." Deutsche Bank Nat'l Tr. Co. v. Fitchburg Capital, LLC, 471 Mass. 248, 254 (2015).

As set forth in the Complaint, Homeowner's loan was accelerated more than 5 years ago. With respect to the Homeowner's mortgage loan, the maturity date of the mortgage loan was accelerated from February 1, 2036 to a date prior to January 31, 2012. See, Complaint ¶¶ 20-34.

Five (5) years next following the maturity date of the Homeowner's note, neither the Defendants nor any predecessor creditors enforced the mortgage by foreclosure or otherwise. Five (5) years next following the maturity dates of the note, neither the Defendants nor any predecessor creditors took any action to extend the five year expiration period provided for under the obsolete mortgage statute, M.G.L. c. 260, § 33.

Therefore, the Homeowner's mortgage became obsolete as a matter of law under the obsolete mortgage statute, M.G.L. c. 260, § 33.⁸ See also, Deutsche Bank, 471 Mass. at 252 ("The amended statute also became self-executing so that any mortgage rendered obsolete by the

⁷ A mortgagee "has no equitable right to disturb mortgagor's possessory interest and cannot bring action to foreclose mortgagor's equity of redemption because no money is due from mortgagor to him; only mortgagee with interest in underlying debt can so enforce mortgage" Eaton v. Fannie Mae, 462 Mass. 569, 578 (2012), quoting, Howe v. Wilder, 77 Mass. 267, 11 Gray 267, 269-270 (1858).

⁸ "Upon the expiration of the period provided herein, the mortgage shall be considered discharged for all purposes without the necessity of further action by the owner of the equity of redemption." Id.

terms of the statute is discharged without further legal action.”).⁹

V. PLAINTIFFS HAVE LIKLIHOOD OF SUCCESS ON MERITS THAT NOTE AND MORTGAGE LACKED FORMATION DUE TO FAILURE TO IDENTIFY LENDING PARTY TO CONTRACT

“There must be at least two parties to a contract, a promisor and a promisee . . .” Restat 2d of Contracts, § 9. On or about April 4, 2005, following an acquisition merger with Washington Mutual Bank, the entity known as “Washington Mutual Bank, FA” changed its name to “Washington Mutual Bank.” On April 4, 2005, as a result of the merger and name change, from April 4, 2005 to the present day, there has never been another legal entity formed using the name of “Washington Mutual Bank, FA.” See, e.g., Washington Mutual, Inc. Form 10-Q for quarter ending March 31, 2005 (“WaMu 3/2005 Form 10-Q”), page 42; Complaint, Ex. C.

On or about January 24, 2006, an attempt was made to form a contract (i.e., the Promissory Note) between Homeowner and Washington Mutual Bank, FA. On or about January 24, 2006, Washington Mutual Bank, FA did not exist as a legally cognizable entity and the attempt to form a contract, i.e., the Promissory Note, in the name of Washington Mutual Bank, FA failed for lack of an essential term, i.e., the identity of the parties to a contract, because divisions of companies are not cognizable entities under the eyes of the law and thus, lack capacity to contract, sue, be sued, hold realty, etc.¹⁰ Nor did Washington Mutual Bank register to do business as “Washington Mutual Bank, FA” in the town of Barnstable, city of Boston, or any other city or town in the state of Massachusetts or, to the knowledge of Homeowner, anywhere else. Complaint, ¶¶ 12-19.

⁹ “[A]lthough the Legislature used the words “after payoff” in the title of the act, it is clear from review of the entire act that the Legislature did not intend to limit all changes in the act to affect only mortgages where the underlying obligations had been paid off or satisfied.” Deutsche Bank at 256-57.

¹⁰ Black letter holds that “[D]ivisions of companies are not separate legal entities but, rather, are parts of the corporation to which they belong” and are therefore subject to dismissal “as a matter of law.” Johnson v. IndyMac Mortg. Servicing, 2014 U.S. Dist. LEXIS 55610, at *1-2 n.1 (D. Mass. 2014). *Id.* quoting, Ruxlign Company v. ITT Corporation, 2013 U.S. Dist. LEXIS 140360, 2013 WL 5450414, at *1 (E.D.Tex. Sept. 30, 2013). The Supreme Judicial Court has held that a voluntary unincorporated association cannot be a party to litigation as it has no capacity as such to sue or to be sued. See, Tyler v. Boot and Shoe Workers Union, 285 Mass. 54, 55 (1933).

VI. **PLAINTIFFS HAVE LIKLIHOOD OF SUCCESS ON MERITS THAT DEFENDANTS FRAUDULENTLY MISREPRESENTED OWNERSHIP STATUS WITH RESPECT TO THE MORTGAGE LOAN**

Defendants claim that JPMorgan Chase ("Chase"), became the noteholder and mortgage holder of Homeowner's mortgage loan when it purchased the assets of Washington Mutual Bank in a receivership action. Not only has Chase has failed and refused at every stage and opportunity to substantiate its claims, but it has actively danced around the issue and concealed known documents in its possession that could verify whether Homeowner's mortgage loan was included in the assets purchased. *See*, Complaint, ¶¶ 35-60. Moreover, evidence in the public domain proves that Washington Mutual Bank securitized the Homeowner's mortgage loan. Complaint, ¶¶ 38-43.

VII. **PLAINTIFFS HAVE LIKLIHOOD OF SUCCESS ON MERITS THAT MORTGAGE LOAN IS UNENFORCEABLE DUE TO UNCONSCIONABLE TERMS, FALSIFIED INCOME DOCUMENTATION, AND NO ABILITY TO REPAY**

"The holding of *Fremont* was that [G. L. c.] 93A prohibits 'the origination of a home mortgage loan that the lender should recognize at the outset that the borrower is not likely to be able to repay.'" *Frappier v. Countrywide Home Loans, Inc.*, 645 F.3d 51, 56 (1st Cir. 2011), quoting *Fremont*, *supra* at 748-749. *See*, *Drakopoulos v. United States Bank Nat'l Ass'n*, 465 Mass. 775, 786 (2013).^{11,12}

Homeowner's 2005 tax returns and paystubs provided to the broker and lender that provided the loan appear to have been ignored by these originators as they were not accurately reflected under section V of the Homeowner's Uniform Residential Loan Application concerning employment and income, where an estimated salary of \$400,000 per year, results in a monthly gross income of only \$33,333 as opposed to the stated \$83,333 as prepared by the loan

originators. A copy of the loan application prepared by originators is attached hereto as Exhibit

2. Thus, the monthly mortgage payment of \$17,000 exceeded 50% of Homeowner's gross monthly income. Where it appears the originators acting in concert to close a loan at all costs employed such unfair and deceptive tactics as use of inflated appraisals and ignoring actual financials provided by the Homeowner, same created fraud and unconscionable means to sell a loan product to Homeowner that was destined to fail.

¹¹ "The basic concept of fair lending that lenders should extend loans that they believe borrowers are able to repay is well-established under Massachusetts law. See *Billingham v. Dornemann*, 55 Mass. App. Ct. 166, 177-179 (2002) (where lender knows of borrower's inability to make payments according to the contract, lender may be liable for treble damages for its unfair conduct); G. L. c. 183, §§ 4 and 28C (requiring that a borrower benefit when refinancing). This requirement has also been acknowledged by both state and federal regulators. [Fn. 13] In 1997, the Massachusetts Division of Banks warned lenders against predatory lending specifically in the context of subprime lending. ADD, 001. The Division of Banks defined predatory lending as "extending credit to a consumer based on the consumer's collateral if, considering the consumer's current and expected income, . . . the consumer will be unable to make the scheduled payments to repay the obligation." *Id.*" See, *Drakopoulos*, at 31-32.

¹² "Federal agencies that enforce federal consumer protection laws have long viewed lending without regard for the borrower's repayment ability as predatory and a violation of consumer protection laws. [Fn. 14] See, e.g., *FTC v. Capital City Mortgage Corp.*, No. 98CV00237, P 28 (D.D.C., second am. complaint filed Jan. 29, 1998) (alleging home-secured loans were based on equity in homes, not the borrowers' ability to pay) (ADD, 006); *United States v. Delta Funding Corp.*, No. 00-1982, P 17 (E.D.-N.Y. filed Mar. 30, 2000) (complaint), settled by consent decree (Apr. 2000) (alleging that subprime lender often approved loans without regard to a borrower's ability to repay and approved loans based on unverified income with no reasonable basis for believing that such income existed) (ADD, 040). [Fn. 15] Moreover, the FDIC, the United States Office of the Comptroller of Currency ("OCC"), the Board of Governors of the Federal Reserve Board ("Federal Reserve Board"), and the Office of Thrift Supervision ("OTS") (collectively the "Federal Financial Agencies") share the FTC's view. For over a decade, these agencies have warned lenders that predatory and abusive lending occurs when a lender originates a loan to a borrower who cannot repay the loan from sources other than the collateral pledged. [] (Expanded Guidance for Subprime Lending Programs (Jan. 31, 2001)); [] (Guidelines for National Banks to Guard Against Predatory and Abusive Lending Practices, OCC Advisory Letter, AL 2003-2 (Feb. 21, 2003) (stating "a fundamental characteristic of predatory lending is the aggressive marketing of credit to prospective buyers who simply cannot afford the credit on the terms being offered" and that such loans are typically underwritten based on the value of the collateral)). See, *Drakopoulos*, at 33-35.

VIII. PLAINTIFFS HAVE LIKLIHOOD OF SUCCESS ON MERITS THAT SUBJECT MORTGAGE CONSTITUTES UNENFORCEABLE HIGH-COST LOAN DUE TO FAILURE TO COMPLY WITH SPECIAL REGULATIONS GOVERNING HIGH-COST MORTGAGE LOANS

In a first mortgage, such as the subject mortgage loan, secured by a consumer's primary residence, where the annual percentage rate at consummation will exceed by more than 6.5 percentage points, the average prime offer rate, shall constitute a high-cost mortgage loan pursuant to 15 USC § 1602 (bb)(1)(A)(i)(I). The law further provides that:

"In the case of any other transaction in which the rate may vary at any time during the term of the loan for any reason, the interest charged on the transaction at the maximum rate that may be charged during the term of the loan." See, 15 USCS § 1602(bb)(1)(B)(iii).¹³

Whereas the rate in effect at consummation was 4.44% (1 year constant US Treasury maturities) and the APOR as of January 2006 was 6.212%, adding the high-cost mortgage margin of 6.5 percentage points yields a high-cost threshold of 12.712%. In other words, if the maximum interest rate permissible under the Promissory Note can exceed 12.712%, then it constitutes a high-cost mortgage loan. As set forth in the Complaint, the APOR need only reach or exceed 7.72%, as it did in May through August of 2000, in order for the operable terms of the Promissory Note to permit an effective rate of interest in excess of 12.712%. See, Complaint, ¶ 84. Therefore, the maximum interest rate permissible under the Promissory Note can exceed

¹³ Subsection (ii) does not apply because under the terms of the Promissory Note the interest varies in accordance with multiple factors, notwithstanding and for reasons other than the index. For example, the terms call for 1) an introductory or teaser rate at consummation, 2) upon the expiration of the introductory rate, the rate changes and begins to follow an index, 3) *regardless of the index*, the rate can only change on a "Change Date," 4) *regardless of the index*, on each Payment Change Date, the rate of interest cannot cause more than a 7 ½ % increase in the monthly payment obligation, 5) *regardless of the index* the rate can change based on the principal balance of the loan, 6) *regardless of the index* the rate can change in the event of a specified type of transfer, and 7) *regardless of the index* the interest rate cannot be greater than 10.263%.

12.712%, thus constituting a high-cost mortgage loan.

As a high-cost mortgage loan, the subject Promissory Note is illegal and unenforceable for failure to make required disclosures under high-cost mortgage loan regulations, the failure to provide counseling to the Homeowner concerning the same, and permitting characteristics, such as balloon payments and prepayment penalties, that are prohibited by law governing high-cost mortgage loans. See, e.g., 5 USCS § 1639.

IX. PLAINTIFFS HAVE LIKLIHOOD OF SUCCESS ON MERITS THAT DUE TO ACCOUNTING ERRORS THERE WAS NO EVENT OF DEFAULT AND PRE-FORECLOSURE NOTICES WERE THUS, INVALID AND FAILED TO SATISFY CONDITIONS PRECEDENT TO A FORECLOSURE SALE

"[T]he obligor shall have the right to rescind the transaction until midnight of the third business day following the consummation of the transaction or the delivery of the information and rescission forms required under this section together with a statement containing the material disclosures required by this chapter, whichever is later . . . No finance or other charge shall begin to accrue on any such transaction until the termination of the rescission period provided for in this section." M.G.L. ch. 140D, s. 10(a).

Following the closing date of January 24, 2006, neither Chase, nor any purported predecessor holders or creditors cured the failures to provide material disclosures to Homeowner, including the provision of accurate disclosures of the APR and finance charges within tolerable limits, and the provision of the Truth-In-Lending disclosure to Maria Smith (the co-mortgagor). Maria Smith was never provided with a copy of the Truth-In-Lending disclosure. A copy of the notice conferring upon Maria Smith the right to cancel within a period of time following her receipt of the Truth-In-Lending disclosure, is attached to the Complaint as "EXHIBIT E".

Thus, from January 24, 2006 to January 24, 2010, Homeowner paid 4 years' worth of

finance charges that creditors were prohibited from charging. See, M.G.L. c. 140D, § 10(a). To date, Chase has failed and refused to credit Homeowner' account with the overpayments and to reverse finance charges against the excess balance. As a result of the overcharges and resulting overpayments on the Mortgage Loan, the purported event of default upon which Chase and Joint-Tortfeasors rely for their right to exercise the power of sale, in fact, never occurred. As a result of the overcharges and overpayments on the Mortgage Loan, the amounts needed to cure the alleged default as stated in the 2016 notice of default were false and the notices were thus, invalid. The failure to accurately notify borrower of the amount needed to cure invalidates right to foreclose as same is required under M.G.L. c. 244, § 35A(h)(4) and paragraph 22 of the mortgage. The failure to comply with G.L. ch. 244, sec. 35A and paragraph 22 of the mortgage invalidates the notice of default and right to cure due to the general requirement of strict compliance with foreclosure related laws when attempting to carry out a non-judicial foreclosure. Pinti v. Emigrant Mortg. Co., Inc., 472 Mass. 226, 243 (2015) ("Emigrant's strict compliance with the notice of default required by paragraph 22 was necessary in order for the foreclosure sale to be valid; Emigrant's failure to strictly comply rendered the sale void."); U.S. Bank Nat'l Ass'n v. Schumacher, 467 Mass. 421, 432 (2014); U.S. Bank National Assoc., v. Ibanez, 458 Mass. 637, 646-647 (2011).

X. **PLAINTIFFS HAVE LIKLIHOOD OF SUCCESS ON MERITS DUE TO DEFENDANT COMING TO COURT WITH UNCLEAN HANDS**

"She who comes into equity must come with clean hands' Thus 'the doors of equity' are closed 'to one tainted with inequity or bad faith relative to the matter in which she seeks relief, however improper may have been the behavior of the' other party." United States v. Perez-

Torres, 15 F.3d 403, 407 (5th Cir. 1994), *quoting from* Precision Instrument Mfg. Co. v. Automotive Maintenance Mach. Co., 324 U.S. 806, 814, 89 L. Ed. 1381, 65 S. Ct. 993 (1945). "'While 'equity does not demand that its suitors shall have led blameless lives' . . . as to other matters, it does require that they shall have acted fairly and without fraud or deceit as to the controversy in issue.'" Fidelity Mgt. & Research Co. v. Ostrander, 40 Mass. App. Ct. 195, 200 (1996), *quoting*, Precision Instrument Mfg. Co. at 814-815. As alleged in the Complaint and supporting affidavits, Defendants engaged in fraud and deceit in seeking to enforce an unenforceable and illegal mortgage loan that was originally procured by fraud and material misrepresentations, and falsely claimed noteholder status through false swearing and concealed pertinent evidence (118-page agreement between FDIC and Chase). Defendants knowingly relied on false affidavits and incomplete evidence to claim ownership and enforce an unformed, time-barred debt that was otherwise illegal and unenforceable. Therefore, on the basis of Eaton and Ibanez, with no authentic note Defendants lack jurisdiction and authority to foreclose, and given the wrongful conduct by originators and grantors, ratified and advanced by the defendants, the doctrine of unclean hands bars them from enforcement of the mortgage loan including the equitable remedy of foreclosure.

XI. PLAINTIFF WILL SUFFER IRREPARABLE INJURY IF FORECLOSURE SALE IS NOT ENJOINED DUE TO UNIQUENESS OF REAL ESTATE.

Absent an injunction, Homeowners will suffer irreparable harm due to the uniqueness of real estate, whereas its loss cannot be compensated by turning over foreclosure sale proceeds. Greenfield Country Estates Tenants Assoc., Inc. v. Deep, 423 Mass. 81 (1996) ("Granting specific performance, the SJC held that "It is well-settled law in this Commonwealth that real property is unique and that money damages will often be inadequate to redress a deprivation of an interest in land."'). "In the attachment context, the impairment of both marketability and mortgageability

has been viewed as a deprivation of a significant property interest." Dobral Realty, Inc. v. Di Chiara, 383 Mass. 559, 564 (1981). "Every piece of real estate has some unique disadvantage as well as advantage. The eagerness of buyers to acquire some properties is matched by the joy with which sellers part with others. Ownership of real estate is burdensome even when profitable. It hampers mobility." Olszewski v. Sardynski, 316 Mass. 715, 717 (1944).

Specifically, as relates to mortgage foreclosure sales, the Supreme Judicial Court has reasoned that if a sale is allowed to proceed it could "result in title passing to a bona fide purchaser without knowledge of the issue — at which point, and depending on the nature of the defense, the mortgagor's right to redeem his or her home may well be lost." Pinti v. Emigrant Mortg. Co., Inc., 472 Mass. 226, 242 (2015)(emphasis added). Federal cases in the context of preliminary injunctive relief have held that evicting a family from their home constitutes irreparable harm.¹⁴ "Aside from the issue of damages, irreparable injury is suffered when one is wrongfully ejected from his home. Real property and especially a home is unique." Johnson v. U.S. Dept. of Agriculture, 734 F.2d 774, 789 (11th Cir. 1984). "Wrongful eviction, as a matter of law, constitutes irreparable injury." Brown v. Artery Organization, Inc., 691 F.Supp. 1459, 1461 (D. Dist. Columbia 1987).

If a wrongful foreclosure sale is held, Homeowner will suffer irreparable harm by loss of a family home and residence. Damages are inadequate to compensate Homeowner because the stress, ignominy, and public recordation of a foreclosure deed cannot be unexperienced.

Moreover, the deprivation of an interest in land manifests widely and in as many varying forms

¹⁴ Federal case law is valid authority in Massachusetts state courts under the rule of Rollins Environmental Services, Inc. v. Superior Court, 368 Mass. 174, 179-180, 330 N.E.2d 814, 818 (1975), where it was held, "the adjudged construction given to the Federal rules is to be given to our rules, absent compelling reasons to the contrary or significant differences in content." The Reporter's Notes to Mass.R. Civ.P. 65 (which governs injunctive relief) state as follows: "Rule 65 is taken with little change from Federal Rule 65. The order of the first two sections has been reversed, to conform to the usual sequence of litigation."

as the interests themselves. For example, following a foreclosure sale, the Homeowners' possessory interests would become compromised well beyond their personal housing needs. Following foreclosure, the Homeowners' ability to rent all or a portion of their properties is greatly diminished, and guests or tenants would be exposed to receiving notices to quit and having court summonses for an eviction served by a constable or taped to a door. Guests or tenants would be subjected to a subsequent purchasers' probing by these and other notices through the mail, calls, and visits by real estate agents inquiring about condition, occupants, and their willingness to vacate. These interferences would further deprive the Homeowners and any guests or tenants of quiet enjoyment, and subject them to further embarrassment. Following a foreclosure sale, the ability of Homeowners to seek any type of financing or to refinance any loan secured by their properties would be impossible. A corollary to any ownership interest in real property is the right to alienate oneself from a parcel of land by sale, and the Homeowners' freedom to sell or convey their properties would be tied up by the public recordation of a foreclosure deed and having the public record reflect the name of a different owner. See, Debra Realty, Inc. v. Di Chiara, 383 Mass. 559, 564 (1981) ("[T]he impairment of both marketability and mortgageability has been viewed as a deprivation of a significant property interest."); See, also, Olszewski v. Sardynski, *Supra*.

With an injunction in effect, there is no *irreparable* harm to the defendant, who stands to lose only money damages. Moreover, Defendants slept on their rights for years, thus, in addition to the expiration of the statutes of limitation, the doctrine of Laches militates against any claim of injury by them.

Homeowner requests that any security requirement be waived or determined a nominal fee (i.e., one dollar), for the reason Defendants stand to suffer no injury or damage as a result of

a short-term delay or postponement of the foreclosure sale, but rather, stand to benefit from judicial review. Foreclosure sales are typically canceled and/or rescheduled all the time due to such factors as weather, expected turn out, lack of bidders, insufficient bids, due diligence required of foreclosing bank to determine desirability (risk v. liability) of taking ownership of a given parcel of land, improved or otherwise, and the delay of a foreclosure sale will in no way affect Defendants' ability to conduct such a sale in the future. Even if Defendants were to prevail, it is of greater value to Defendants to judicially rule out the potential for future and greater liability for engaging in a wrongful foreclosure sale.

Under these circumstances, the balance between the competing risks cuts in favor of the moving party such that a preliminary injunction should issue. "[A] substantial possibility of success on the merits warrants issuing the injunction." *Packaging Industries Group, Inc. v. Cheney*, 380 Mass. 609, 617 n. 12, 405 N.E.2d 106, 112 n. 5 (1980).

WHEREFOR, based on the Complaint, affidavits, supporting documents and exhibits, the plaintiff respectfully prays this honorable Court allow his motion for specific performance and a temporary restraining order and, following an opportunity for Defendants to be heard, enjoin the Defendants preliminarily pending the outcome of the suit, and enter such restraining orders to restrain Defendants, their respective agents, servants, employees, representatives, or attorneys, and specifically, the auction company, Commonwealth Auction Associates, Inc., from the following:

- (a) conducting a foreclosure sale of plaintiffs' properties at 230 Starboard Lane, Osterville, MA;
- (b) attempting to or actually taking possession of the property located at 230 Starboard Lane, Osterville, MA;
- (c) interfering in any way with plaintiffs' possession or ownership in the properties located at 230 Starboard Lane, Osterville, MA; and

a short-term delay or postponement of the foreclosure sale, but rather, stand to benefit from judicial review. Foreclosure sales are typically canceled and/or rescheduled all the time due to such factors as weather, expected turn out, lack of bidders, insufficient bids, due diligence required of foreclosing bank to determine desirability (risk v. liability) of taking ownership of a given parcel of land, improved or otherwise, and the delay of a foreclosure sale will in no way affect Defendants' ability to conduct such a sale in the future. Even if Defendants were to prevail, it is of greater value to Defendants to judicially rule out the potential for future and greater liability for engaging in a wrongful foreclosure sale.

Under these circumstances, the balance between the competing risks cuts in favor of the moving party such that a preliminary injunction should issue. "[A] substantial possibility of success on the merits warrants issuing the injunction." *Packaging Industries Group, Inc. v. Cheney*, 380 Mass. 609, 617 n. 12, 405 N.E.2d 106, 112 n. 5 (1980).

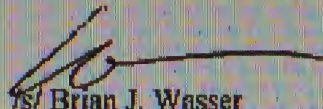
WHEREFOR, based on the Complaint, affidavits, supporting documents and exhibits, the plaintiff respectfully prays this honorable Court allow his motion for specific performance and a temporary restraining order and, following an opportunity for Defendants to be heard, enjoin the Defendants preliminarily pending the outcome of the suit, and enter such restraining orders to restrain Defendants, their respective agents, servants, employees, representatives, or attorneys, and specifically, the auction company, Commonwealth Auction Associates, Inc., from the following:

- (a) conducting a foreclosure sale of plaintiffs' properties at 230 Starboard Lane, Osterville, MA;
- (b) attempting to or actually taking possession of the property located at 230 Starboard Lane, Osterville, MA;
- (c) interfering in any way with plaintiffs' possession or ownership in the properties located at 230 Starboard Lane, Osterville, MA; and

- (c) such further and additional acts and omission and upon such terms as this Court deems just and proper.

The Plaintiff,
By his attorney,

July 27, 2018


/s/ Brian J. Wasser
Brian J. Wasser, BBO #633621
REALTYESQUIRE, PC
P.O. Box 151
W. Hyannisport, MA 02672
(508) 862-9999
lawclaims@msn.com

FILED JUL 30 2018

Scott L. Wilson Clerk

COMMONWEALTH OF MASSACHUSETTS

BARNSTABLE, SS.

THE TRIAL COURT
SUPERIOR COURT DEPT.
CIVIL ACTION NO.

Scott Smith
PLAINTIFFS

v.

JPMorgan Chase Bank, NA and
Harmon Law Offices, PC
DEFENDANTS

AFFIDAVIT OF SCOTT SMITH

I, Scott Smith, upon personal information, certify under the pains and penalties of perjury that the facts pertaining to my home and the purported mortgage loan, as stated in the emergency motion for injunctive relief and the complaint, are true and accurate to the best of my knowledge and belief, and that the attached exhibits thereto and to the complaint are true and accurate copies of the documents they purport to be, including the mortgage, note, and sale date notice, respectively, that were provided to us and/or appear on the public record as the documents they represent to be and from the sources stated therein.

In my copy of the closing documents there was no truth-in-lending disclosure provided to my wife as the co-mortgagor.

July 27, 2018



Scott Smith

COMMONWEALTH OF MASSACHUSETTS

BARNSTABLE, SS.

**THE TRIAL COURT
SUPERIOR COURT DEPT.
CIVIL ACTION NO.**

Scott Smith
PLAINTIFFS

v.
JPMorgan Chase Bank, NA and
Harmon Law Office, PC
DEFENDANTS

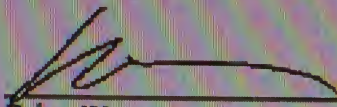
AFFIDAVIT OF BRIAN WASSER

I, Brian Wasser, being duly sworn, do depose and state as follows:

1. I am counsel for the Plaintiff and make this Affidavit based upon my own personal knowledge.
2. Complaint Exhibits A, B, H and J are true and accurate copies of the subject note, mortgage, property description and notice of right to cancel taken from the borrower's copies of the closing documents given to my client by the purported lender, and the mortgage and property description are consistent with the mortgage and property description recorded at the Barnstable County Registry of Deeds of the Land Court, Document No. 1024999.
3. Complaint Exhibits C-G are true and accurate copies of the documents I researched online and downloaded or printed from the U.S. Securities and Exchange Commission's website (Exs. C, E and G); the Boston City Clerk's dba search website (Ex. D); and the U.S. Treasury's website.¹
4. The emergency motion for injunctive relief ("Motion"), Exhibit 1, is a true and accurate copy of the pages printed from defendant, Harmon Law Office, PC's website, and from its auctioneer, Commonwealth Auction Associates, Inc.'s website.
5. Motion, Exhibit 2, is a true and accurate copy of the loan application form taken from the borrower's copies of the closing documents given to my client by the purported lender.

¹ <https://www.treasury.gov/about/organizational-structure/ig/Documents/Inspector%20General%20Thorson%27s%20WaMu%20Written%20Testimony%204-16-2010.pdf>

Signed under the pains and penalties of perjury this 27 day of July, 2018.

A handwritten signature in black ink, appearing to read 'Brian Wasser', written over a horizontal line.

Brian Wasser

Harmon Law Offices, P.C. (/)

[HOME \(/\)](#) [PAYOFF AND REINSTATEMENT REQUEST \(/PAYOFF-AND-REINSTATEMENT-REQ](#)
[DIRECTIONS TO HARMON LAW OFFICES \(/DIRECTIONS-TO-HARMON-LAW-OFFICES.HTML\)](#)

We utilize different auction companies to conduct our foreclosure auctions. The links to th

The auction companies below update their sale schedules on a regular basis. If the sale y
websites, please contact our office and we can provide you with the status of the schedule

Commonwealth Auction Associates, Inc. (<http://www.commonwealthetauction.c>

Commonwealth Auction Associates, Inc. also maintains an Auction Schedule Line at (617)
evening to reflect the next day's active auctions. Please click the link above to visit their v
information.

Irving Shechtman & Company, Inc. (<http://www.auctionsri.com/>)

Once in the site, select Real Estate from the link bar on the left to obtain the auction sche

Please note that auctions are frequently cancelled or postponed up to the last r

Notes:

MAPQUEST

7/31/2018 1:00 PM

230 STARBOARD LANE, OSTERVILLE (BARNSTABLE),
Massachusetts

County: Barnstable Book: 1024999 Page: 159064 and

Deposit: \$50,000.00

Notes:

MAPQUEST

7/31/2018 1:00 PM

179 - 181 WELLS STREET, GREENFIELD, Massachusetts

County: Franklin Book: 5955 Page: 206

Deposit: \$5,000.00

Notes:

MAPQUEST

7/31/2018 1:00 PM

6 Hill Street, South Easton, Massachusetts

County: Bristol (Northern) Book: 20202 Page: 194

Deposit: \$5,000.00

Notes:

MAPQUEST

7/31/2018 2:00 PM

99 Pine Avenue, Hyannis, Massachusetts

County: Barnstable Book: 31139 Page: 55

Deposit: \$15,000.00

Notes:

MAPQUEST

7/31/2018 3:00 PM

47 CABOT STREET, BEVERLY, Massachusetts

County: Essex (Southern) Book: 22110 Page: 115

Deposit: \$5,000.00

Notes:

MAPQUEST

7/31/2018 1:00 PM

230 STARBOARD LANE, OSTERVILLE (BARNSTABLE),
Massachusetts

County: Barnstable Book: 1824999 Page: 159064 and

Deposit: \$50,000.00

Notes:

MAPQUEST

7/31/2018 1:00 PM

179 - 181 WELLS STREET, GREENFIELD, Massachusetts

County: Franklin Book: 5955 Page: 206

Deposit: \$5,000.00

Notes:

MAPQUEST

7/31/2018 1:00 PM

6 Hill Street, South Easton, Massachusetts

County: Bristol (Northern) Book: 20202 Page: 194

Deposit: \$5,000.00

Notes:

MAPQUEST

7/31/2018 2:00 PM

99 Pine Avenue, Hyannis, Massachusetts

County: Barnstable Book: 31139 Page: 55

Deposit: \$15,000.00

Notes:

MAPQUEST

7/31/2018 3:00 PM

47 CABOT STREET, BEVERLY, Massachusetts

County: Essex (Southern) Book: 22110 Page: 115

Deposit: \$5,000.00

Notes:

MAPQUEST**Postponed**

7/31/2018 3:00 PM

19 Quincy Way, Unit 19, 17-19 Quincy Way Condominium, Attleboro,
Massachusetts

County: Bristol (Northern) Book: 14659 Page: 119

Deposit: \$5,000.00

Notes:

Postponed to 9/04/18 @ 12:00 pm

MAPQUEST

7/31/2018 3:00 PM

THE MORTGAGE PLACE, INC.

V. MONTHLY INCOME AND GENERAL HOUSING EXPENSE INFORMATION

[illegible]

* Self-Employed Borrowers may be required to provide additional documentation such as tax returns and financial statements.

B/C Describe Other Income: None. Alimony, child support, or security performance bonus need not be reported if the donor (B) or co-donor(s) (C) does not choose to have it considered for purposes of the credit.

VI. ASSETS AND LIABILITIES

[illegible]

Generalized ☒ Jobby ☐ Pay Jobby

[illegible]

Product Identification

Хитомы и релизы

[illegible]

FAVING MAR 20 1900 723

02-14-1994 10:52

CUMULATIVE ENERGY RESERVE FUND LOAN APPLICATION

THE MORTGAGE PLACE, INC.

Use the construction sheet type
used on the loan to complete the
application. Do not use the
type II for construction of the
construction.

Borrower

SCOTT C SMITH

Co-Borrower

Agency Case Number

Lender Case Number

By signing this form, the borrower agrees to the terms and conditions of the loan, including the interest rate, the amount of the loan, the term of the loan, and the right of the lender to foreclose on the property in the event of default. The borrower also agrees to pay the lender's fees and charges, including the origination fee, the processing fee, the underwriting fee, and the closing fee. The borrower also agrees to pay the lender's costs and expenses, including the cost of the appraisal, the cost of the title insurance, and the cost of the recording fees. The borrower also agrees to pay the lender's taxes and insurance, including the property taxes and the hazard insurance. The borrower also agrees to pay the lender's legal fees and costs, including the cost of the legal opinion, the cost of the legal fees, and the cost of the recording fees. The borrower also agrees to pay the lender's other fees and charges, including the cost of the title insurance, the cost of the recording fees, and the cost of the appraisal. The borrower also agrees to pay the lender's other costs and expenses, including the cost of the appraisal, the cost of the title insurance, and the cost of the recording fees. The borrower also agrees to pay the lender's other taxes and insurance, including the property taxes and the hazard insurance. The borrower also agrees to pay the lender's other legal fees and costs, including the cost of the legal opinion, the cost of the legal fees, and the cost of the recording fees. The borrower also agrees to pay the lender's other fees and charges, including the cost of the title insurance, the cost of the recording fees, and the cost of the appraisal.

Borrower's Signature

X

Date

De-Borrower's Signature

X

Date

Provide Form 8878

Page 4 of 4

DENTON 2000, INC. * 717.333.8333

Form 8878 Form 1001 3/05